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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

74-954

THE UNITED STATES OF AMERICA)
ex rel HENRY R. COBELL,
Respondent,)

v.)

THE HONORABLE JOHN P. SHARP)
AND THE BLACKFEET TRIBAL
COURT,)
Petitioners.
)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The honorable John P. Sharp and the Blackfeet Tribal Court respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on September 5, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on September 5, 1974, is printed as Appendix A hereto and is reported at 503 F.2d 790 (1974).

The Memorandum Opinion, Order and Judgment of the United States District Court for the District of Montana, filed on December 15, 1972, denying respondent's motion for reconsideration, is printed as Appendix B hereto.

The Memorandum Opinion and Order of the United States District Court for the District of Montana, filed on December 6, 1972, is printed as Appendix C hereto.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment in this case on September 5, 1974. On November 4, 1974, the Court of Appeals entered

its order granting respondent-appellant's motion for extension of time for filing a petition for rehearing, and also on November 4, 1974 entered its order denying the petition for rehearing.

The jurisdiction of this Court is invoked under Title 28 U.S.C. sections 1254(1) and 2101(c), and under Rule 22(3), Supreme Court Rules.

QUESTIONS PRESENTED

(1) Whether a person aggrieved by an order of an Indian tribal court must exhaust available tribal court remedies before seeking a writ of habeas corpus from a United States District Court pursuant to 25 U.S.C. § 1303 ?

(2) Whether Indian tribal courts must give full faith and credit to state court judgments where the state courts do not recognize judgments rendered by

Indian tribal courts?

(3) Whether the Blackfeet Indian Nation, by tribal ordinance and without complying with applicable provisions of P.L. 280 and the Indian Civil Rights Act, could transfer jurisdiction over marriage, divorce, and related matter to courts of the state of Montana, thereby leaving the Blackfeet Tribal Court without jurisdiction to render a decree affecting the custody of children of divorced tribal members?

(4) Whether the Blackfeet Tribal Court could assume jurisdiction over Blackfeet Indian children found on the Blackfeet Indian Reservation and, having determined that the welfare of the children was in jeopardy, enter a temporary decree inconsistent with an outstanding interlocutory state court decree concerning the custody of the children.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Article I, Section 8 of the Constitution of the United States, of the Wheeler-Howard Act (48 Stat. 984), of Public Law 280 (67 Stat. 588), of the 1968 Civil Rights Act (82 Stat. 77), of the Blackfeet Tribal Constitution, and of the Law and Order Code of the Blackfeet Tribe are set forth in Appendix D hereto.

STATEMENT OF THE CASE

The basic issue in this case is the legality of an order of the Blackfeet Tribal Court, asserting control over two Blackfeet Indian children in contravention of a temporary state court order.

Joan and Henry Cobell are both enrolled members of the Blackfeet Indian Tribe. Married on October 17, 1963 on the Blood Indian Reserve in Alberta,

Canada, they subsequently had two children, Rodney and Venetta. Both are minors, and although they possess a substantial amount of Indian blood neither is eligible for enrollment in the Blackfeet Tribe.

In August of 1971, Joan Cobell filed for divorce in the state district court in Great Falls, Montana. Henry counterclaimed and a decree was entered on December 22, 1971 giving custody of the minor children to Henry. Actual custody of the children was apparently surrendered to Henry soon thereafter. Then in August, 1972, Joan petitioned the State District Court for a modification of the December 22nd decree. A Temporary Order was entered on August 4, 1972 granting custody of the children to Joan until such time as a hearing could be held. On

August 14, 1972, a hearing was held and the court thereafter granted permanent custody to Joan. Under the authority of this order, she took the children to her home on the Blackfeet Indian Reservation. Following an appeal to the Montana Supreme Court, the State District Court on September 26, 1972 vacated its August Order and granted temporary custody of the children to Henry. In spite of this order, the children remained on the Blackfeet Indian Reservation in the custody of Joan Cobell.

On October 6, 1972, Leona Conway, the children's maternal grandmother, petitioned the Blackfeet Tribal Court to take custody of the children. Finding that the two young children were "without adequate supervision" and were "suffering emotionally and pyschologically because of the uncertainty of the custody and adult supervision," the Tribal Court

entered a temporary ex parte order on the same day placing the children "under the care, custody and control of this court." The order further provided that the two children could not be removed from the reservation without further order of the Tribal Court. This order was by its terms clearly temporary, lasting only until a final determination upon the question of custody was made by the state court. The order plainly indicates that the tribal court would enforce such a final state court decree provided that it was satisfied that the custody provisions were for the best interests of the children. A copy of this order was sent to Henry Cobell at his last known address.

Rather than seeking relief from the Tribal Court order either by moving to vacate the order on any of the grounds

subsequently raised in the federal habeas proceeding or by appealing the trial court's order to the Blackfeet appellate court, Henry filed a petition for a writ of habeas corpus in the United States District Court for the District of Montana. Jurisdiction in this court was based on Title 25 U.S.C. §1303.

On December 6, 1972, the District Court granted the petition. Appellants Blackfeet Tribal Court and Chief Judge John Sharp filed a motion for reconsideration which was denied by the District Court's order of December 15, 1972.

Leona Conway, the Blackfeet Tribal Court, and Judge Sharp filed notices of appeal from the orders of December 6 and December 15 granting the writ of habeas corpus. Separate appeals were perfected and were consolidated by stipulation. The

district court stayed its order seven days to permit appellants to make application to the United States Court of Appeals for the Ninth Circuit for a stay pending appeal. The stay was continued by a single judge of the Court of Appeals until January 2, 1973. On January 3, 1973, the Court of Appeals dissolved the stay on the grounds "that the best interests of the children will not be served by staying the decision of the United States District Court." Although the order was not received by the Blackfeet Tribal Court for nearly a week, the Tribal Court on the very day the order was filed in San Francisco, January 3, in demonstration of its good faith, entered an order vacating its October 6th restraining order and directed Joan Cobell to deliver custody of the children to

Henry Cobell. Within a week Henry picked up the children and took them to Billings, Montana. Joan and Henry subsequently took part in state court proceedings to determine final custody of the children.

The issues presented by the appellants on appeal to the United States Court of Appeals for the Ninth Circuit were:

1. The trial court erred in refusing to dismiss the petition for the writ of habeas corpus on the ground that petitioners failed to exhaust available tribal court remedies.

2. The trial court erred in holding that the tribal court must enforce the judgments and interlocutory decrees of state courts.

3. The trial court erred in holding that the tribal court procedures employed

in this case violated petitioner's federally protected rights; and, alternatively, if the tribal court procedures did violate Henry's rights, the court improperly granted an unconditional writ of habeas corpus.

4. This controversy is not moot, even though the Cobell Children are not presently on the Blackfeet Reservation, and so are not now within the jurisdiction of the tribal court.

The Court of Appeals, in its opinion filed September 5, 1974, (reported at 503 F.2d 790 (1974)) affirmed the judgment of the District Court. It found:

(1) That exhaustion of tribal remedies was not an inflexible requirement, and in this case exhaustion was not practical since it appeared that Henry

Cobell lacked meaningful remedy in the Tribal Court.

(2) That the controversy was not moot since the underlying conflict between the Tribal Court and the state courts still existed.

(3) That the October 6, 1972 order of the Tribal Court was unlawful because the Tribal Court was without jurisdiction; the Blackfeet Tribe had "relinquished" jurisdiction over marriage, divorce, and adoption by way of provisions in Chapter 3 of the Blackfeet Tribal Law and Order Code and that this relinquishment encompassed a surrender of jurisdiction over custody determinations incident to divorce.

Subsequently, on November 4, 1974, the Court of Appeals granted the motion of appellants Blackfeet Tribal Court and

Judge Sharp for extension of time for filing a petition for rehearing. The petition for rehearing, which urged that the Court of Appeals had overlooked this Court's decision in Kennerly v. District Court, 400 U.S. 423 (1971) in finding a relinquishment of jurisdiction, was denied without opinion by the same order.

REASONS FOR GRANTING THE WRIT

As the court below recognized this case involves the conflicting jurisdictional claims of the Montana state courts and the Blackfeet Tribal Court. The decisions of the District Court and the Court of Appeals are inconsistent with: (1) United States Constitution which recognizes the inherent sovereignity of Indian tribes, (2) the Indian Civil Rights Act by which Congress attempted to balance the personal rights of individual Indians

with the tribe's right of self-government, (3) several decisions of this court, namely Williams v. Lee, 358 U.S. 217 (1959) Kennerly v. District Court, 400 U.S. 423 (1971) which uphold the Indian right to self-government, and (4) decision of other federal courts, particularly O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973), requiring exhaustion of tribal court remedies.

This Court should grant the Writ of Certiorari in this case in order to resolve crucial conflicts in the interpretation and application of the Indian Civil Rights Act and to resolve the continuing and expanding conflict between state governments and tribal governments concerning jurisdiction over events occurring on Indian Reservations. This case presents conflicts typical of those coming

before state and federal courts with increasing regularity, but with totally inconsistent resolutions.

ARGUMENT

I

THE COURT OF APPEALS ERRED IN HOLDING THAT EXHAUSTION OF TRIBAL COURT REMEDIES WAS NOT REQUIRED IN THIS CASE.

In Ex Parte Hawk, 321 U.S. 114 (1944) this Court established the "exhaustion doctrine" which requires one detained under a state court judgment to exhaust all state remedies before seeking relief in federal courts. Congress, in enacting 28 U.S.C. 2254 gave its approval to the "exhaustion doctrine." This doctrine has been extended to military prisoners, Gusik v. Schilder, 340 U.S. 128 (1952), federal prisoners, Williams v. U.S., 431 F.2d 873 (5th Cir. 1970) and to aliens being deported, Ex parte Lee Fong Fook,

74 F. Supp. 68,(N.D. Calif. 1948). There seems to be no reason why the exhaustion doctrine should not also apply to those in custody under Indian Tribal Court judgments. Indeed there are compelling reasons why an exhaustion requirement should be applied to suits brought under the Indian Bill of Rights, 25 U.S.C. § 1302. As the Eighth Circuit emphasized in O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1146 (8th Cir. 1973)

> "[t]he adoption of the Indian Bill of Rights was not meant to detract from the generally recognized policy, stated in the Williams case, of preserving the 'authority of tribal courts.'"

The O'Neal court concluded that an exhaustion requirement was supported by the Indian Civil Rights Act itself, as well

as by this Court's decision in Williams v. Lee, 358 U.S. 217 (1959).

The court below did not disagree with O'Neal but applied the exhaustion doctrine in a way which ignored the policies behind such a requirement as well as the undisputed facts in this case. Its finding that exhaustion was not required in this case was based on the fact that the tribal judge indicated that he would not have rescinded his order. Assuming arguendo that the tribal judge indicated that he would not have been persuaded to rescind his order and that this fact makes further relief from the tribal court "unavailable", the undisputed fact remains that the Blackfeet Law and Order Code establishes a Blackfeet Appellate Court with jurisdiction to hear appeal from judgments and decrees issued by any of the tribal judges.

Thus Henry Cobell, petitioner below, had a right to appeal the tribal court's order to the Blackfeet Appellate Court and his failure to do so constitutes a deliberate bypassing of available tribal court remedies. The petition for federal habeas corpus should have been denied on this basis alone.

II

IN THE ABSENCE OF AN EFFECTIVE TRANSFER OF JURISDICTION OVER CUSTODY MATTERS TO THE STATE OF MONTANA, THE COURTS BELOW ERRED IN HOLDING THAT THE BLACKFEET TRIBAL COURT COULD NOT, IN THE ABSENCE OF A SPECIFIC GRANT OF AUTHORITY FROM CONGRESS, DECLINE TO HONOR THE DECREE OF THE STATE COURT.

A.

IN THE ABSENCE OF A GOVERNING ACT OF CONGRESS A TRIBAL COURT NEED NOT ENFORCE A JUDGMENT OR DECREE FROM A STATE COURT.

In its opinion of December 15, 1972, the District Court recognized that under the holdings of this Court from Worcester v. Georgia, 31 U.S. 515 (1832) to

Williams v. Lee, supra, Indian Tribes and their tribal courts possess sovereign powers except as limited by treaties and Acts of Congress. Thus it is well established that Indian Tribes require no specific grant of authority from Congress to act in matters essential to tribal self-government. The District Court misapplied this principle and held that the Tribal Court's order was unlawful in the absence of a specific grant from Congress because the matter involved here was not essential to tribal self-goverment. However, it can hardly be denied that the welfare of Indian children on an Indian Reservation is a matter essential to tribal self-government. Thus, the court below should have held that the Tribal Court order would be valid unless prohibited by an Act of Congress. As no Act of Congress

prohibits the Blackfeet Tribal Court from entering decress affecting the custody of Blackfeet Indian children within the Blackfeet Indian Reservation nor requires tribal courts to give full faith and credit to state court judgments, the Tribal Court decree should have been upheld.

B.

THE HOLDING THAT THE POWER TO MAKE A CUSTODY DETERMINATION IS NOT A MATTER ESSENTIAL TO TRIBAL SELF-GOVERNMENT ESTABLISHES A PRECEDENT WHICH DANGEROUSLY UNDERMINES DECISIONS OF THIS COURT REGARDING TRIBAL SOVEREIGNTY.

Indian Tribes are recognized as sovereign by the Constitution of the United States. Article I, Section 8, clause 3 provides that Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.

This Court has acknowledged the sovereignty of Indian Tribes, Worcester v.

Georgia, 31 U.S. (6 Pet.) 515 (1832), and has defined that sovereignty as extending to all matters essential to tribal self-government. Williams v. Lee, supra. It has protected that sovereignty by holding that a state may not acquire jurisdiction regarding matters essential to tribal self-government except by complying with the requirements of the governing Acts of Congress. Kennerly v. District Court, 400 U.S. 423 (1971).

Although this Court has not established guidelines regarding what are matters essential to tribal self-government, it seems beyond question that the power to exercise custody over the minor children of tribal members, present on the reservation, to prevent foreseeable harm to the children, is a power essential to tribal self-government. Under the

doctrine of parens patriae, such a power is one of the traditional standards of internal sovereignty, and it has never been held by this Court that the Full Faith and Credit Clause applies to child custody decrees issued by states. See Justice Frankfurter's concurring opinion in May v. Anderson, 345 U.S. 528, 536 (1953).

In view of the fact that the challenged tribal power seems almost certainly to be one essential to tribal self-government, it becomes clear that it was the conflict with the decreee of the Montana state court that prompted the courts below to hold that a specific grant of authority was required to validate the Tribal Court order. If internal tribal sovereignty is to mean anything, there will be times when it conflicts with

state sovereignty. The mere existence of such a conflict cannot be the basis for limiting tribal authority unless the concept of Indian self-determination is to be abandoned.

C.

IN LIGHT OF THIS COURT'S HOLDING IN KENNERLY v. DISTRICT COURT, IT WAS ERROR FOR THE COURT OF APPEALS TO HOLD THAT THE BLACKFEET TRIBE COULD IN ABSENCE OF COMPLIANCE BY THE STATE OR BY THE TRIBE WITH GOVERNING ACTS OF CONGRESS, RELINQUISH TO THE STATE OF MONTANA JURISDICTION OVER MARRIAGE, DIVORCE, ADOPTION, AND CHILD CUSTODY DETERMINATIONS.

Affirming the District Court's holding that the Tribal Court's order of October 6, 1972 was unlawful, the Court of Appeals held that through the Blackfeet Tribal Law and Order Code, the Blackfeet Tribe had relinquished jurisdiction over marriage, divorce, and adoption to the state of Montana, and that this relinquishment encompassed a surrender of

jurisdiction over custody determinations incident to divorce actions.

The Blackfeet Tribe is a federally recognized Indian Tribe organized and incorporated under the Wheeler-Howard Act (48 Stat. 986, 25 U.S.C. §461 et seq.). The Tribe adopted a Constitution under this Act which was approved by the Secretary of the Interior on December 13, 1935 and has been amended at various times since then.

There is no question that at the time the Blackfeet Constitution was approved, the Tribe had jurisdiction over marriage, divorce, adoption, and custody determinations incident to divorce when the proceedings involved Tribal Members. The Wheeler-Howard Act (25 U.S.C. §476), provides that any tribe organizing under the Act shall have all the powers vested

in any Indian Tribe by existing law. In addition, the Tribal Constitution provided that jurisdiction should extend to all Tribal members. Blackfeet Constitution, Art. VI, Section 1(k). The question is whether the Tribal Law and Order Code, which was enacted subsequent to the adoption of the Tribal Constitution, may, in light of the Kennerly decision, be held to have transferred such jurisdiction to the state of Montana.

The pertinent provisions of the Law and Order Code are found in Chapter 3, entitled "Domestic Relations." They are Sections 1 and 2 and provide as follows:

Sec. 1 Marriages

> All members of the Blackfeet Indian Tribe shall hereafter be governed by State Law and subject to State jurisdiction with respect to marriage

hereafter consummated. Common law marriages and Indian custom marriages shall not be recognized within the Blackfeet Reservation.

Sec. 2 Divorces

All divorces must be consummated in accordance with the State Law of Montana. Indian custom divorces are from this time on illegal and will not be recognized as lawful on the Blackfeet Reservation.

It is doubtful that the intent of the Tribe was to relinquish any jurisdiction by these provisions, but in any event it is indisputable that the provisions could not, under Kennerly, transfer any jurisdiction to the state unless and until the State of Montana complied with existing federal law.

Before the Court in Kennerly was the

very same Blackfeet Tribal Law and Order Code involved here. This Court held in Kennerly that provisions in Chapter 2 of the Code could not suffice to transfer jurisdiction over civil matters because neither the Tribe nor the State of Montana had complied with the requirements of either of the Acts of Congress governing the transfer of jurisdiction from Indian Tribes to states.

Kennerly is directly in point here. The governing Acts of Congress are the same two which were in effect when Kennerly was decided: Public Law 280, 67 Stat. 588 and the 1968 Civil Rights Act, 82 Stat. 77 (25 U.S.C. §1322). The requirements of neither were complied with to transfer jurisdiction over marriage, divorce, and custody determinations incident to divorce from the Tribe to the

State of Montana. Therefore, it is submitted that there could not have been any transfer of such jurisdiction from the Blackfeet Tribe to the State and that it was error on the part of the Court of Appeals to so hold.

CONCLUSION

The holdings of the Court of Appeals undermine the concept of Tribal sovereignty which has been consistently upheld by this Court. The holding that there may be a transfer of jurisdiction from the Blackfeet Tribe to the State of Montana in the absence of compliance with governing Acts of Congress is directly in conflict with this Court'd decision in the Kennerly case. For these reasons, it is

respectfully submitted that the Writ of Certiorari be granted.

Respectfully submitted,

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January 31, 1975

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel. HENRY F. COBELL, *Petitioner-Appellee,* vs. JOAN R. COBELL, et al., *Respondents,* & LEONA CONWAY, *Respondent-Appellant.*	No. 72-3175
UNITED STATES OF AMERICA ex rel. HENRY F. COBELL, *Petitioner-Appellee,* vs. JOAN R. COBELL, et al., *Respondents,* & THE HONORABLE JUDGE JOHN SHARP and the BLACKFEET TRIBAL COURT, *Respondents-Appellants.*	No. 73-1071

[September 5, 1974]

Appeal from the United States District Court
from the District of Montana

Before: DUNIWAY and TRASK, Circuit Judges,
and SHARP, District Judge*

OPINION

TRASK, Circuit Judge:

This is a unique child custody struggle involving the conflicting jurisdictional claims of the Montana state courts and the

*Honorable Morell E. Sharp, United States District Judge from the Western District of Washington, sitting by designation.

Blackfeet Tribal Court. The controversy comes before us on appeal from the granting of a writ of habeas corpus by the federal district court pursuant to 25 U.S.C. § 1303.[1]

Henry and Joan Cobell, the parents of the two minor children who are the subjects of this custody battle, are both enrolled members of the Blackfeet Tribe. In August 1971, Joan Cobell sued for a divorce in the Montana state court and Henry Cobell counterclaimed. A divorce decree was entered the following December and Henry Cobell was granted temporary custody of the children. In August 1972, however, the state court modified its original order and transferred custody of the children to their mother, pending further hearings. Acting under the authority of this revised order, Joan Cobell took the children to her mother's home on the Blackfeet Reservation. Meanwhile, Henry Cobell successfully appealed the custody reversal to the Montana Supreme Court. The August 1972 order granting custody to Joan Cobell was vacated and temporary custody was restored to Henry. The mother, however, refused to surrender the children, and it is at this point that the Blackfeet Tribal Court intervened. On a petition from the children's maternal grandmother (appellant Leona Conway), Tribal Judge John Sharp assumed jurisdiction over the controversy and issued, *ex parte*, a temporary restraining order enjoining the children's removal from the Blackfeet Reservation.[2] Service of the order was effected on Henry Cobell

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[1]Section 1303 reads:

"The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

[2]The full text of Judge Sharp's order reads:

"Upon the filing of a Petition by Leona Conway and good cause having been shown;

"NOW THEREFORE, it is ordered as follows:

I.

"That Venetta Lynn Cobell and Rodney Dale Cobell are hereby declared to be without sufficient and adequate supervision; and,

II.

"That said children are presently residing on the Blackfeet Reservation and are Indian offspring, of parents who are enrolled members of the Blackfeet Tribe and legal residents; and,

by mail. Shortly thereafter, Henry Cobell filed a petition for a writ of habeas corpus in the federal district court in order to secure the release of his two children. The District Court granted the writ and ordered that the custody of the children be restored to the father in accordance with the Montana state court rulings. The children's grandmother, Leona Conway, and Tribal Judge John Sharp both appeal the granting of this writ.[3]

III.

"That said children are suffering emotionally and psychologically because of the uncertainty of their custody and adult supervision; and,

IV.

"That the Court as a friend and protector of these children deems it necessary under the circumstances to assume the care, custody and control of the children, by virtue of its jurisdiction, until a hearing may be held after investigation by the Welfare Department; and,

V.

"That said children be, and they are hereby ordered to be under the care, custody and control of this Court; and,

VI.

"That the children are not to be removed from the Blackfeet Reservation by anyone without further order of this Court; and,

VII.

"That a copy of this order be served personally or through the mail upon the parents, Henry Cobell and Joan Cobell; and,

VIII.

"That the Welfare Department is ordered to provide for these children until further order of this Court, and to make periodic reports to this Court that it may request;; [sic] and;

IX.

"That this Order will be temporary until this Court is satisfied that Montana State District Court has made a final determination upon the question of custody and until this Court is further satisfied that custody provisions are accepted and for the best interests of said children.

DATED this 6th day of October, 1972." C.T. at 4-5.

[3]On January 3, 1973, Judge Sharp issued an "Order to Vacate," as follows:

"Action and compliance [sic] with the December 15, 1972, Order of the United States District Court for the District of Montana and the January 3, 1973, Order of the United States Court of Appeals for the Ninth Circuit.

"IT IS ORDERED that the temporary restraining order of October 6, 1972, is hereby vacated;

Preliminarily, we address the appellants' argument that the habeas corpus petition was prematurely entertained since the petitioner had not "exhausted" his tribal remedies. That is, it is urged that a principle analogous to the "exhaustion of state remedies" doctrine be applied to federal review of tribal actions. Here it is argued that Henry Cobell could have requested a hearing before Judge Sharp or could have appealed the tribal restraining order to a special tribal appellate court before he sought federal intervention.

Unlike the general habeas corpus statute directed against unlawful state custody (28 U.S.C. § 2254), there is no express exhaustion requirement contained in the specialized writ which is involved in this controversy, 25 U.S.C. § 1303.[4] Nonetheless, we acknowledge the principle of comity which underlies the exhaustion doctrine, *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973), and note that the doctrine has been applied in other non-state contexts, *e.g., Gusik v. Schilder*, 340 U.S. 128, 131-32 (1952) (habeas attack on military judgment). The arguments in favor of extending the exhaustion doctrine to reviews of tribal action under the Indian Bill of Rights, 25 U.S.C. §§ 1301-1303, are well summarized in *Dodge v. Nakai*, 298 F. Supp. 17, 25 (D. Ariz. 1968):

> "First, this interpertation [reading an exhaustion requirement into the act] would reconcile the statute with 'a strong Congressional policy to vest Navajo Tribal Government with responsibility for their own affairs.' . . . Second, this interpretition would place primary responsibility for the vindication of rights violated by Indian governmental agencies upon the tribal courts. Such responsibility may well enhance

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"IT IS FURTHER ORDERED that the custody of the two (2) children, Venetta Lynn Cobell and Rodney Dale Cobell, is hereby awarded to their father, Henry Cobell;

"IT IS FURTHER ORDERED that Joan Cobell release the children to Henry Cobell at his request.

"Dated this 3rd day of January, 1973.

"/s/ John P. Sharp
JOHN P. SHARP, Chief Judge
for the Blackfeet Tribe."

Brief for Appellants at Appendix A.

[4]See n. 1, *supra*.

> the development of an independent Indian judiciary, thus reconciling the statute with recognized federal policy . . . . Third, this interpretation would insure that this Court would intervene only in those instances which local conflicts cannot be resolved locally . . . ."

The reasoning in *Dodge v. Nakai* has also been recently approved by the Eighth Circuit. In *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1146 (8th Cir. 1973), the court concluded:

> ". . . [T]he adoption of the Indian Bill of Rights was not meant to detract from the generally recognized policy, stated in the *Williams* case, of preserving the 'authority of tribal courts . . . .' Williams v. Lee, *supra*, 358 U.S. at 223, 79 S.Ct. 269. Furthermore, we believe that the policy stated in *Williams* 'would support an exhaustion requirement.'"

See also McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973).

Our recognition of the exhaustion principle in the tribal context is not unqualified, however. We concur with the view expressed by the Eighth Circuit that "exhaustion is not an inflexible requirement." *O'Neal v. Cheyenne River Sioux Tribe, supra* at 1146. The court there further observed:

> "A balancing process is evident; that is weighing the need to preserve cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights. Thus this Court must determine whether exhaustion is appropriate in the case at bar." *Id.* at 1146.

Indeed, exhaustion was ultimately found to be impractical in *Dodge v. Nakai, supra* and *McCurdy v. Steele, supra*, cases which endorsed the exhaustion principle in general. Likewise, we do not believe that the District Court here erred when it concluded that Henry Cobell lacked meaningful remedy in the tribal courts. First, the restraining order issued by Judge Sharp contained no invitation to participate in tribal appellate processes. Rather, the *ex parte* order, although designated as "temporary", spoke with a tone of finality. More significantly, however, is the fact that Judge Sharp testified that he had issued the restraining order to test tribal jurisdiction, and that only a federal court order

would cause him to rescind the action. Under these circumstances, we agree with the District Court's conclusion that:

> ". . . [T]he petitioner had no effective remedies available to him in Tribal Court. . . . That remedies are available in theory, but not in fact, is not synonymous with failure to exhaust remedies. That ineffective and meaningless procedures were available to petitioner does not preclude his seeking a writ of habeas corpus." C.T. at 101-102.

At the outset we are confronted with the question of mootness although not urged by any of the interested parties. Following the action of Judge Sharp which vacated the Tribal Court's restraining order and ordered Joan Cobell to release the children to Henry Cobell at his request, the children were obtained by Henry who returned with them to Billings, Montana. The parents were then involved in active litigation before Montana state courts concerning custody. Thus the order of the District Court has been fully performed.

However, the determination of the issue by the District Court and compliance therewith by the interested parties does not necessarily render the cause moot. The underlying conflict still exists. Notice of appeal was filed both by Leona Conway and by the Blackfeet Tribal Court and the Honorable John Sharp, Judge. The District Court noted that it had been informed that an appeal would be taken when his final order was made. The loser in the custody battle in the Montana state courts may still return to the reservation as a sanctuary in the hope that Judge Sharp or his successor might upon reconsideration choose not to follow the existing District Court ruling. Indeed the brief on behalf of Judge Sharp and the Tribe, in its opposition to any suggestion of mootness, frankly states that "[i]t is much more than merely possible that the childless parent will continue to use the judicial processes available to obtain custody—it is almost a certainty!"

It is clear that the voluntary cessation of the conduct which has been challenged does not necessarily render the case moot. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *So. Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498 (1911); *Alton & So. Ry. Co. v. Int'l Ass'n. of Mach. & A.W.*, 463 F.2d 872 (D.C. Cir. 1972); *Mootness on Appeal in the Supreme Court*, 83 Harv.

L. Rev. 1673, 1682 (1970). Here the situation itself, plus the implications of the appellants' briefs, suggests the tinder which can not only inflame the same controversy but bring the same parties before the court again. In addition, there is a public interest in having the issue now before the court resolved with some hope of finality. It affects the most sensitive of human relationships; it also directly involves the vital jurisdictional harmony of two sovereign entities. The case has not become moot either as a matter of judicial administration or of constitutional dimension under article III.

We therefore turn to the primary jurisdictional issue involved in this appeal. The State of Montana's interest in the welfare of the Cobell children is beyond dispute. The children were domiciled in the state and enrolled in the state public school system when Joan and Henry Cobell began their divorce proceedings. Presence, domicile and jurisdiction over the parents are well recognized bases for the assertion of jurisdiction to determine child custody. Restatement (Second) Conflict of Law § 79 (1971). Even more pertinent is Mont. Rev. Stat. Tit. 21, § 138 (1947) which states:

> "In an action for divorce the court or judge may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same."

Thus, by *voluntarily* invoking the state court's jurisdiction for divorce purposes, the Cobells clearly submitted the question of their children's custody to the judgment of the Montana state courts. Moreover, Montana, like the majority of states, views its jurisdiction in custody matters as continuing, *Barbour v. Barbour*, 134 Mont. 317, 330 P.2d 1093 (1958), and unaffected by the removal of the children from the state, *Butts v. Collins*, 129 Mont. 61, 289 P.2d 949 (1955).

Notwithstanding the jurisdictional claims of the Montana courts, the appellants argue that the presence of the children on the Blackfeet Reservation gave the Tribal Court a coequal interest in the children's welfare. Although the possibility that two sovereigns may enjoy concurrent jurisdiction in a custody situation is well recognized, Restatement (Second) Conflict of Law § 79

(1971), we do not believe that such a situation exists here. First, unlike the State of Montana, the jurisdiction of the Blackfeet Tribal Court is limited and does not extend to the full range of domestic relations incidents. Chapter 3 of the Blackfeet Tribal Law and Order Code explicitly disclaims tribal jurisdiction over marriage, divorce and adoption. The Code defers to state law and state jurisdiction for proceedings in those areas.[5] We interpret this relinquishment of jurisdiction to encompass a surrender of jurisdiction over custody determinations incident to divorce actions as well. The appellants, however, contend that Chapter 3, Section 6 of the Blackfeet Tribal Law and Order entitled "Proceedings for the Termination of the Parent-Child Relationship" gave the Tribal Court authority for its action. We disagree. The provision cited by the appellants deals with child neglect and abandonment on the Reservation. Only a strained reading can support application of that provision to this child custody struggle which is characterized by the very opposite of parental neglect. Moreover, nowhere in the detailed Code provisions is there any reference to the child custody determinations coincident with divorce. Rather, Section 6 contains the disclaimer:

> "This judicial action is intended primarily for those situations where other judicial remedies appear inappropriate and is not intended to modify Sections 1, 2 and 3 of Chapter 3 of the Blackfeet Tribal Law and Order Code dealing with the applicability of State laws to marriage, divorce and the determination of paternity."

We therefore conclude that the Tribal Court lacked jurisdiction to determine the custody of the Cobell children and that the

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[5]The Blackfeet Tribal Law and Order Code states at Chapter 3, as follows:

"Section 1, Marriages.

"All members of the Blackfeet Indian Tribe shall hereafter be governed by State law and subject to State jurisdiction with respect to marriage hereafter consummated. Common law marriages and Indian custom marriages shall not be recognized within the Blackfeet Reservation.

"Section 2, Divorces.

"All divorces must be consummated in accordance with the State law of Montana. Indian custom divorces are from this time on illegal and will not be recognized as lawful divorces on the Blackfeet Reservation."

court's order restraining the children was unlawful. The writ of habeas corpus was properly granted.

Judgment Affirmed.

DUNIWAY, Circuit Judge, dissenting:

I dissent, on two alternative grounds.

First, I am of the opinion that this case is moot. After these appeals were filed, this court denied a stay of the district court's order on January 3, 1973. On the same day, tribal Chief Judge Sharp entered the order set out in footnote 2 to Judge Trask's opinion. Judge Sharp's order does more than vacate the temporary restraining order that he had entered, it affirmatively awards custody of the children to Henry Cobell. We are advised that Henry has in fact taken custody, and that the children are with him in Billings, Montana, off the reservation, where he has been attending college. Henry has thus obtained from Judge Sharp the exact relief that he sought from the United States District Court.

The possibility that the children may at some time be brought back to the reservation is not, in my view, a basis for saying that the action is not moot. I think that the possibility is far too speculative. I cannot believe that Henry, while he has custody, will take them back to the reservation. If the Montana court should award custody to Joan, she would be entitled to take them there. Only if she did so, and then only if Henry were again successful in reversing the Montana court's order, would there be a possibility of another resort to Judge Sharp's court. Such a possibility is, to me, too remote to warrant a holding that this case is not moot. If it should occur, the background of the case would be substantially different from what it is now, and Judge Sharp might well, at such a time, refuse to enter an order similar to his order of October 6, 1972. If he should enter another order, it would be in the light of a different factual background from that of this case.

Second, assuming that the case is not moot, I would vacate and remand on the ground that the court should have abstained until Henry had exhausted his remedies in the tribal court.

Regardless of what Judge Sharp may have said about his jurisdiction and his desire to have the question settled or his belief that the question ought to be settled in a Federal Court, I find nothing in the record indicating that Henry could not have appeared and moved to set Judge Sharp's order aside, and nothing indicating that, had he done so, Judge Sharp would have refused to hear him. Moreover, and more important, we do not, in habeas corpus cases, permit the by-passing of state remedies merely because the state law, or something that a state court has said, makes it appear probable that the petitioner's use of state remedies will not succeed. As we said in *Morehead v. State of California*, 9 Cir., 1964, 339 F.2d 170, 171: "'Ineffectiveness' of State relief cannot be established if no attempt is made to obtain that relief." *See also Pate v. Wilson*, 9 Cir., 1965, 348 F.2d 900, 901. I would apply the same principle to tribal courts.

In addition, if Henry were unsuccessful in Judge Sharp's court, he could have appealed. The Blackfeet Tribal Law and Order Code sets up an Appellate Court (Blackfeet Tribal Law and Order Code, Ch. 1, Sec. 5). There is nothing in the record to indicate that Henry, if unsuccessful before Judge Sharp, could not have appealed. See *Darr v. Burford*, 1950, 339 U.S. 200, 208.

For the reasons stated in *O'Neal v. Cheyenne River Sioux Tribe*, 8 Cir., 1973, 482 F.2d 1140, I would apply the exhaustion of remedies doctrine to habeas corpus cases under 25 U.S.C. § 1303 which involve detention under orders of tribal courts. Those courts will never become the effective instruments for the administration of justice that they are supposed to be if every time one of them issues an order for detention the person detained, or someone acting on his behalf, can immediately inject a federal district court into the proceedings by asking for a writ of habeas corpus. The other two cases cited by Judge Trask, *Dodge v. Nakai*, D.Ariz., 1968, 298 F.Supp. 17, and *McCurdy v. Steele*, D.Utah, 1973, 353 F.Supp. 629, are distinguishable. See *O'Neal, supra*, 482 F.2d at 1146.

If it were clear that Judge Sharp had no jurisdiction, I might reach a different result. But he did have jurisdiction. The Blackfeet Tribal Law and Order Code, Chapter 3, Domestic Relations, Sec. 6, D, confers upon the Tribal Court "original jurisdiction over petitions to terminate the parent-child relationship when the

child involved is present on the Blackfeet Indian Reservation." This is precisely the jurisdiction that Judge Sharp purported to exercise. Whether he exercised his jurisdiction properly is another question, and as to that question I would require exhaustion of tribal remedies.

I would vacate the order of the district court and remand with directions to dismiss the proceedings as moot. Alternatively, I would vacate and remand with directions to dismiss without prejudice pending exhausting tribal court remedies.

Filed
Dec. 15, 1972
John J. Parker, Clerk
By Elaine E. McGhee, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

UNITED STATES OF AMERICA ex rel HENRY F. COBELL,	)	Civil No. 3123
Petitioner,	)	MEMORANDUM
-vs-	)	OPINION, ORDER AND
JOAN R. COBELL and THE HONORABLE JUDGE JOHN SHARP and THE BLACKFEET TRIBAL COURT, and LEONA CONWAY,	)	JUDGMENT
Respondents.	)	

The respondents, Blackfeet Tribal Court and its Chief Judge, the Honorable John Sharp, have moved this court to reconsider and vacate its order of December 6, 1972. That order directed a

writ of habeas corpus to issue releasing the petitioner's minor children from the custody of the Blackfeet Tribal Court. The court has been informed by counsel that the other respondents join in this motion, though not formally, and that they will not be submitting separate memoranda, thus allowing expeditious consideration of the motion.

1. Respondents argued that the petitioner deliberately bypassed his Tribal Court remedies, and, as a consequence, that he is not entitled to a writ of habeas corpus.

By the order of December 6th this court found that petitioner had exhausted all remedies available to him in both the State and the Tribal Courts and thus satisfied the prerequisites for the issuance of the writ. The court is not

presently inclined to recant.

As noted in the previous order, Judge Sharp testified before this court that it was his intention not to rescind his order, that he had issued it for purposes of testing his jurisdiction, and that he did not expect it changed except by order of a Federal Court. From his testimony, it is the opinion of this court that the petitioner had no effective remedies available to him in Tribal Court. Whatever remedies may have existed were effectively curtailed by the entrance of the order which the court has heretofore held invalid. That remedies are available in theory, but not in fact, is not synonymous with failure to exhaust remedies. That ineffective and meaningless procedures were available to petitioner does not preclude his seeking a writ of

habeas corpus.

2. Next, respondents argue that the order of the Blackfeet Tribal Court was in the nature of a temporary restraining order, thus properly rendered after an ex parte procedure, and therefore not violative of due process.

Much of what is said above is equally applicable here. Although the order of the Blackfeet Tribal Court was in name temporary, the Judge who issued it expressed his intent not to modify that order.

Furthermore, the order, on its face, does not reflect that its continued enforcement is conditional upon some conduct of the petitioner. Rather, it is expressly conditioned upon the satisfaction of the Tribal Court with some future custodial order of a Montana District

Court. The order stated that it was to be in effect until the Tribal Court was satisfied with a modification of the State Court custody decree. The petitioner had done all that could be done in that regard. He had received from the District Court as final a custody order as is possible. That order represented a finding by the State District Court that the father was the proper custodial parent, and that awarding the minor children to his custody was in the best interests of those children. For the Tribal Court to condition its order on modification of the State Court's fresh custodial order is not an act susceptible to the label of temporary.

3. Respondents next attack what they call this court's implicit finding that the real reason behind the Tribal Court's

order was the creation of a "sanctuary" for Indian persons. Respondents argue this to be an unwarranted finding, not supported by any evidence.

In its order, this court noted that the Tribal Court's order was, by expression, made for the protection and well-being of the minor children, but found that its tenor reflected another end. The respondents take the court's conclusion as inferring that the Tribal Court acted with bad purpose in issuing the order. This court condemned the effect of the Tribal Court's order. The use of the term "tenor" does not reflect an attempt by this court to read a purpose into the order in question. Rather, it was employed as a description of the effect of the order or the trend which the order reflected. This court does not doubt the

experience reflected in the affidavit filed with the motion. Nor does it doubt that Judge Sharp proceeds in good faith in instances when his office is called upon to interact with state law enforcement officials. This court does not condemn the practices of the Tribal Court; it is only the effect of its order which this court finds to invalidate its issuance.

4. Respondents conclude that this court has made an erroneous assumption regarding the extent of Tribal Government authority without specific grant by Congress. The court recognizes that Tribes possess such power as not limited by Congress. But that principle is not that upon which this court predicated its decision. When the court noted that it could find no controlling Federal

legislation which would justify the order of the Tribal Court, this court was not assuming that an Indian Tribe requires a grant of power by Congress to act regarding matters essential to Tribal self-government. It is clear from Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959), that " . . . the Indian Tribes retain exclusive jurisdiction over essential matters of Reservation government in the absence of specific Congressional limitation, ..." State of Arizona ex rel. Merrill v. Turtle, 413 F.2d 683, 684 (9th Cir. 1969). But we do not here deal with matters within the exclusive jurisdiction of Indian Tribes for we do not deal with matters which are essential to Reservation government. Instead, we are in an area where a Tribe has acted in disregard of the powers of a

sovereign state. By doing so, the Tribe erects a barrier between it and the sovereign state. It is the belief of this court that before a Tribe of Indians may so interfere with the powers of the sovereign government of any state, it needs a Congressional grant of authority. Finding no such grant, I find the order of the Tribal Court in this case to be invalid.

5. Finally, the respondents argue that the state court lacks subject matter jurisdiction of enrolled members of the Blackfeet Tribe who are temporarily residing off the Reservation. This is the first time the issue of state court jurisdiction to grant the divorce and custody decree has been raised. In the December 6th order, after noting that no party had contested the jurisdiction of the state courts in this regard, the court

noted that it could find no impediments to the assumption of that jurisdiction. I find no impediment now.

Respondents argue that there can be no jurisdiction of Indian persons temporarily residing off the Reservation. It is interesting to note that the marriage ceremony dissolved by the Montana divorce decree was performed in Canada, off the Reservation; that the petitioner and one of the respondents invoked the jurisdiction of the Montana Court while off the Reservation; and that the petitioner still resides off the Reservation. The logical end of the argument here made by the respondents is that whenever an Indian person, be he a Tribal member or not, resides off the Reservation, that residence is necessarily perpetually temporary, for the Indian person could at

any time return to the Reservation. While this court is unwilling to draw a fine line, suffice it to say that where an Indian person has assumed a residence off an Indian reservation, and, otherwise qualifying, invokes the jurisdiction of the District Court, he cannot defeat that jurisdiction by informing the court he is an Indian person, temporarily residing off the Reservation.

Therefore, the court, being fully apprised and advised in the matter, and, having by an Order dated the 6th day of December, 1972, granted the petition for writ of habeas corpus directing the return of the two minor children to the petitioner and custodial parent under the District Court order of the State of Montana,

IT IS THEREFORE ORDERED AND

ADJUDGED that the writ of habeas corpus in favor of the petitioner be granted.

IT IS FURTHER ORDERED AND ADJUDGED that by granting of the writ of habeas corpus petition, that the minor children be returned to the petitioner and custodial parent.

IS IS HEREBY FURTHER ORDERED AND ADJUDGED that the Tribal Judge release the two minor children, Rodney Dale Cobell and Venetta Lynn Cobell, and deliver them to the custody of the petitioner herein, at the end of seven (7) days from the date of this order. The court, having been informed that an appeal will be taken from this judgment, believes it to be in the best interests of the children to stay this judgment for that period, thus allowing the Circuit Court to determine whether it is appropriate to continue the

stay of this judgment pending determination of the merits of the appeal.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that petitioner recover from the respondents his costs expended in this cause, to be fixed and taxed by the Clerk of the Court, pursuant to Rule 17(a) of this Court.

Done and dated this 15th day of December, 1972.

JAMES H. BATTIN
United States District
Judge

Filed
Dec. 6, 1972
By Elaine E. McGhee, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

UNITED STATES OF AMERICA ex rel HENRY F. COBELL,) Civil No. 3123

Petitioner,)

-vs-) MEMORANDUM OPINION AND

JOAN R. COBELL and THE HONORABLE JUDGE JOHN SHARP and THE BLACKFEET TRIBAL COURT, and LEONA CONWAY,) ORDER

Respondents.

Petitioner has applied to this court for a writ of habeas corpus which would require the release of his two minor children, Rodney Dale Cobell and Venetta Lynn Cobell, from the custody of the Blackfeet

Tribal Court of the Honorable Judge John Sharp established by an order of that court dated the 6th day of October, 1972. Petitioner alleges that the order of the Tribal Court was made without jurisdiction and therefore is illegal and subject to attack by a writ of habeas corpus.

JURISDICTION OF THIS COURT

This court finds that it has jurisdiction pursuant to the provisions of 25 U.S.C. § 1303, which provides:

> "The privilege of writ of habeas corpus shall be available to any person, in a court of the United States to test the legality of his detention by order of an Indian tribe."

The clarity of the grant of jurisdiction contained in that section is beyond cavil

RIGHT OF THE PETITIONER TO CONTEST THE CUSTODY OF HIS CHILDREN

Before this court may inquire into the legality of the order, it must

be clear that the petitioner satisfies the prerequisites of the writ. Ordinarily, all that is necessary is that a petitioner for a writ exhaust all remedies available to him in the jurisdiction whose assertion of custody he attacks. Here, there is an additional question: That is, the right of this petitioner to contest the custody of one other than himself.

That there is non-identity of the petitioner with the person subject to the allegedly unlawful custody presents no obstacle to decision. The father of minor children, where he is the custodial parent, necessarily has standing to question the detention of his children.

Habeas corpus is an extraordinary writ which, at the discretion of a Federal Judge, should issue only in the most extraordinary circumstances. I find such

circumstances here. I do not read the order of the Tribal Court as inviting the petitioner to appear in that court to seek custody of these children. On the contrary, although the order is, by expression, temporary, it is conditioned upon the satisfaction of the Tribal Court with the order of the Montana State District Court concerning the custody of the children, and then only if the Tribal Court finds those arrangements acceptable and in the best interests of the children. Though the order may be "temporary", it is not conditional upon the activities of this petitioner. He is without further remedy before the Tribal Court.

Ten days prior to the issuance of the order by the Tribal Court, the District Court for the Eighth Judicial District of the State of Montana had issued an order

granting the custody and control of the said minor children to the petitioner, Henry F. Cobell. A custody order is, by its nature, never technically final and, since the circumstances of the custodial or other parent may change, it is necessarily subject to the continuing jurisdiction of the court which issued it and the concurrent jurisdiction of any other court of competent jurisdiction before whom the minor children might appear with the parent.

This discussion leads to but one end: 1) That the Tribal Court asserted jurisdiction over these children and, by the expression of the Honorable Judge Sharp before this court, that court considered the assertion of jurisdiction to be final and uncontestable; and 2) that the petitioner had utilized every remedy

available to him in the judicial system of the State of Montana.

LEGALITY OF THE ORDER OF THE TRIBAL COURT

Having decided that this court has jurisdiction to hear the petitioner's claim, and that the petitioner has the right to bring his claim, all that remain to be decided are its relative merits.

The scope of review that this court may undertake under 25 U.S.C. § 1303 is limited to a determination of the legality of the order issued by the Honorable Judge Sharp. I find that order to be improper, not because of its express purpose, but rather because of its tenor, a distinction of some import.[1]

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[1]Although the order purports to be issued to protect the well-being of the minor children in question, its tenor and the circumstances surrounding its

The effect of the order is to allow a Tribal Court to establish a sanctuary for Indian persons, both members and non-members, who have subjected themselves to state court jurisdiction, merely because the Indian person takes flight to the Indian reservation. I find that to be an

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issuance bespeak another effect. The order recites, in apparent reference to the jurisdictional provision of the Blackfeet Law and Order Code, that the children had resided within the territorial limits of the reservation, that they were without sufficient and adequate supervision, and that they were suffering emotionally and psychologically because of the uncertainty of their custodial and adult supervision. As explained in footnote 2, I do not reach the question of the extent of the Tribal Court's jurisdiction under the section relied upon. And, although the predicates of the order may be doubtful in view of the circumstances, the court does not rest its decision upon the validity of the factual findings pursuant to which the order was made.

an exercise of Tribal power beyond that granted in any controlling Act of Congress.[2]

The order recites: That the children subject to the order are not to be removed from the reservation without the permission of the court; that they are under the custody of the Tribal Court; and, in effect, that the order will be in effect until the Tribal Court is satisfied with a determination by the

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[2]The Blackfeet Tribal Constitution grants Tribal Court jurisdiction over Tribal members. Art. VI, § 1(k), Const. of the Blackfeet Tribe. This opinion leaves open the question of the validity and effective scope of the declarations, delegations and disclaimers made pursuant to the above section in Chap. 2, §1, and Chap. 3, §§ 1, 2 and 6C of the Blackfeet Law and Order Code, 1967. It should be noted in passing that the court recognizes that there are doubts in many minds about their validity in view of the Kennerly decision; however, it is presently both inappropriate and unnecessary to reach

Montana District Court regarding the custody of the children.

Here, the parents, and consequently the children, had submitted themselves to the jurisdiction of the Montana District Court, not only at the time of the divorce but also when they sought modification of the custody portion of the divorce decree. Neither the order in question nor any of the parties contest the power of the Montana courts in this regard. My research reveals no impediments to state court divorce and custody jurisdiction over Indian persons, be they Tribal members or not, who, otherwise qualifying, personally invoke that jurisdiction.

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those questions. Kennerly v. District of Montana, 400 U.S. 423 (1971).

Shortly after the invocation of that jurisdiction, the Tribal Court entertained and granted a petition collaterally attacking the state court's judgment, though not its jurisdiction. I find the Tribal Court's conduct to be improper in three connections.

First, even assuming concurrent Tribal Court power to modify state court custody decrees, the order in question fails to even purport such a purpose. It does not reflect that it is initiated because of a change in parental condition justifying a modification. Ten days before its issuance, an order of the state court which retained continuing jurisdiction of this matter denied, in effect, a petition for modification. While I cannot and do not hold that the Tribal Court is bound by the full faith and credit clause

of the Federal Constitution, I entertain no doubt as to the applicability of the doctrine of comity.

Second, the petition was granted following an ex parte plea by the grandmother of the children. That proceeding substantially failed to accord requisite due process. The Tribal Court is commanded by 25 U.S.C. § 1302(8) not to deprive persons before it of liberty or property without due process of law. I perceive no meritorious argument to the present applicability of that section. The order results from an ex parte petition granted in circumstances where the real party in interest, the petitioner herein, was not notified nor given an opportunity to appear. The order is therefore invalid as the product of a judicial act substantially violative of

the concept of due process.

Third, and most important, the order is an invalid exercise of power by the Tribal Court. Assuming, arguendo, that the provisions of the Law and Order Code under which the Tribal Court acted are properly promulgated, and that, therefore, the Tribal Court has power to act in similar circumstances, the order is nonetheless an improper exercise, for no governing Act of Congress contemplated the establishment of a shield of immunity for Tribal members of other Indian persons against the powers of this or any sovereign state of the Union where such individual has either consented to or invoked the jurisdiction of the state. The orderly administration of justice cannot tolerate escape from sanctions of the law, duly evolved, merely because the individual

against whom they are levied enjoys the status of "Indian person." An Indian person properly before a state tribunal of competent jurisdiction cannot avoid the result of the exercise of that jurisdiction by flight to a reservation.

Nor is such individual clothed with immunity by an act of the Tribal organization, be it through the Tribal Court or Council, for, again, no Act of Congress contemplates the exercise of Tribal power, either expressed or implied to isolate the reservation from due process of the law by establishing an island of amnesty within the territory of the state, flight to which will shield an Indian person from the operation of the law.

It is indeed a narrow context to which the court here addresses itself.

I speak only of the absence of Congressional expression on the subject of Tribal government powers to shield Indian persons from the proper operation of the law where a state court's jurisdiction has been invoked by such person. Congress no more contemplated escape by an Indian person from the effect of the divorce and custody decree by flight to the reservation than it contemplated an escape from criminal sanctions by an Indian person who commits an offense off the reservation by flight to the reservation for sanctuary.

Thus, even assuming some power to act, the pruported exercise of power to protect the minor children here constitutes an invalid and improper act by an Indian Tribe.

IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus

directing the return of the minor children of the petitioner, the custodial parent under order of the District Court of the State of Montana, is granted.

Done and dated this 6th day of December, 1972.

JAMES F. BATTIN
United States District
Judge

U. S. Const. art. I, §8:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Wheeler-Howard Act, 48 Stat. 984, §16:

Sec. 16. Any Indian Tribe or Tribes, residing on the same reservation shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified

as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said Tribe shall also vest in such Tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or

other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Public Law 280, 67 Stat. 588, §6:

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal

jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their state constitution or statutes as the case may be.

1968 Civil Rights Act, Title IV, section 402 (25 U.S.C. §1322):

Sec. 402(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such

measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the

United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement or statute, or with any regulation made pursuant thereto; or confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by any Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

1968 Civil Rights Act, Title II, §203 (25 U.S.C. §1303):

Sec. 203. The privilege of the writ of habeas corpus shall be available to any person, in a Court of the United States, to test the legality of his detention by order of an Indian tribe.

Blackfeet Tribal Constitution, Article VI, section 1(k):

SECTION 1. Enumerated Powers.--The council of the Blackfeet Reservation shall exercise the following powers, subject to any limitations embodied in the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws.

(k) To promulgate ordinances for the purposes of safeguarding the peace and safety of residents of the Blackfeet

Indian Reservation, and to establish minor courts for the adjudication of claims or disputes arising amongst the members of the tribe, and for the trial and punishment of members of the tribe charged with the commission of offences set forth in such ordinances.

Blackfeet Tribal Law and Order Code, Chapter 3, Domestic Relations:

Sec. 1 Marriages

All members of the Blackfeet Indian Tribe shall hereafter be governed by State Law and subject to State jurisdiction with respect to marriage hereafter consummated. Common law marriages and Indian custom marriages shall not be recognized within the Blackfeet Reservation.

Sec. 2 Divorces

All divorces must be consummated in accordance with the State Law of Montana. Indian custom divorces are from this time on illegal and will not be recognized as lawful divorces on the Blackfeet Reservation.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

UNITED STATES OF AMERICA,
ex rel. HENRY F. COBELL,

Respondent,

-vs-

THE HONORABLE JOHN P. SHARP
and THE BLACKFEET TRIBAL COURT,

Petitioners.

BRIEF OF APPELLEE

Henry F. Cobell, appellee herein, respectfully submits that the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case on September 5, 1974, be denied.

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked under Title 28, U.S.C., Section 1254(1); 25 U.S.C., Section 1303; and 28 U.S.C., Sections 1291 and 2253; and pursuant to Rule 41, Rules of the Supreme Court, Title 28, Appendix, page 7694.

STATEMENT OF THE CASE

This case involves the custody of two children born of

the marriage of Joan R. Cobell and Henry F. Cobell. They were married October 17, 1963, at Cardston, Alberta, Canada. The two children are Rodney Dale Cobell and Venetta Lynn Cobell. The parents are Indians and enrolled members of the Blackfeet Indian Tribe. The children, although they have Indian blood in them, have insufficient percentage of Indian blood to qualify as enrolled members of the Blackfeet Tribe. In August, 1971, while the couple were residents of Great Falls, Montana, Joan R. Cobell filed for divorce in the state District Court of the Eighth Judicial District, in and for the County of Cascade. The parties had been residents of Montana for more than a year preceding the commencement of the divorce action. She asked for a divorce, for the care, custody and control of the two children, and for child support payments.

Henry F. Cobell answered the allegations to the complaint on file, counterclaimed and requested the court to grant him a divorce, and he asked for the care, custody and control of the two minor children.

On December 22, 1971, with both parties submitting to the jurisdiction of the state District Court, said court held a hearing and granted a divorce to both Joan R. Cobell and Henry F. Cobell, one from the other. The court also declared that the defendant, Henry F. Cobell, was to have the care, custody and control of the two minor children. The court further ordered that the Court of Conciliation of the Eighth Judicial District of the State of Montana should make an immediate study of the needs of the children and the type of home each of the parties was able to provide for the said children, and asked the Court of Conciliation to secure the assistance of the Mental Hygiene Clinic in this regard.

Subsequent to that order the plaintiff, Joan R. Cobell,

petitioned the court for an order changing the custody of the two minor children to the plaintiff, Joan R. Cobell. On August 14, 1972, without a hearing, the court ordered the minor children to be changed to the temporary custody of Joan R. Cobell. A show cause hearing was set for the 14th day of September, 1972, regarding the change of the custody. However, the state District Court, without affording the defendant a substantive hearing, granted the temporary custody of the two minor children to the plaintiff, Joan R. Cobell.

On September 19, 1972, Mr. Cobell petitioned the Montana Supreme Court for a Writ of Prohibition, asking relief from that court and for an order rescinding the District Court's order granting temporary custody to Joan R. Cobell. On September 19, 1972, the Montana Supreme Court issued a show cause order to the state District Court to appear on September 28, 1972, to show cause why Mr. Cobell should not receive the relief he prayed for in his writ. Subsequent to the show cause order being issued, the state District Court deleted from its order of September 14, 1972, that portion relating to the custody of the children being granted to Joan R. Cobell. Accordingly, the temporary custody of the two children remained with Henry F. Cobell.

In the meantime, Joan R. Cobell took the two children to Browning, Montana, located on the Blackfeet Indian Reservation. When the order of the Montana Supreme Court came down, Mrs. Cobell took the two children out of the public school system and fled to unknown places for approximately three weeks.

By order of the state District Court, dated September 26, 1972, the said District Court reinforced its order that the custody of the two minor children should be with their

father, Henry F. Cobell, and that Joan R. Cobell should immediately return the children to their father. The court also issued orders to the sheriff to insure that the provisions of the order were complied with. Joan R. Cobell refused to comply with the order and continued to refuse to obey the order of the Montana Supreme Court and the state District Court. On October 11, 1972, the state District Court issued a warrant of attachment for the arrest of Joan R. Cobell, setting bail in the sum of one thousand and no/100 dollars ($1,000.00).

On or about October 6, 1972, through an order drafted by an attorney at law (Tr. 22, line 4) and signed by Judge John Sharp, the Blackfeet Tribal Court asserted temporary care, custody and control over the two minor children and ordered that the minor children not be removed from the Blackfeet Indian Reservation. This is the first case of this type to occur on the Blackfeet Indian Reservation (Tr. 26, lines 8,9).

It is undisputed that Henry F. Cobell and Joan R. Cobell are residents of Montana and are also enrolled members of the Blackfeet Tribe. However, the two minor children are non-members of the Blackfeet Tribe (see Exhibit "1" attached to Appellee's Brief submitted in lower court, which indicates the qualifications for membership in the Blackfeet Tribe; and also Exhibit "2" attached to said brief, indicating that the two children are not enrolled in the Tribe). Further, from a reading of Ordinance No. 14, Section 2(b) and (c) of the Blackfeet Reservation of Montana, it appears that the two children are not eligible for enrollment in the Tribe. It is undisputed that both father and mother voluntarily submitted themselves to the jurisdiction of the state District Court of the Eighth Judicial District in order to have their marriage dissolved and to have the issue of the care, custody

and control of the two minor children determined by that court.

Joan R. Cobell was served with the petition for writ of habeas corpus and order to show cause in this matter on October 18, 1972. She failed to honor said documents and did not appear at said hearing held on October 25, 1972 (Tr. 3 and 4).

ARGUMENT SUMMARY

While the principal concern of appellee arises to sustain the court in its holding that the writ of habeas corpus be granted, we will discuss the main issues fully.

1. Jurisdiction of Federal District Court in this habeas corpus proceeding.

2. The lack of jurisdiction of the Blackfeet Tribal Court in this matter.

3. The jurisdiction of Montana courts.

In addition, the Petition for Writ of Certiorari brings up the following questions:

1. Whether Indian Tribal Court remedies must be exhausted before seeking a writ of habeas corpus from a U.S. District Court.

2. Whether Indian Tribal Courts must give full faith and credit to state court judgments.

3. Whether the action of the Blackfeet Indian Nation, by transferring jurisdiction over marriage, divorce and related matters to courts of the state of Montana, can be upheld.

4. Whether the Blackfeet Tribal Court could assume

jurisdiction over Blackfeet Indian children found on the Blackfeet Indian Reservation, even though there is an outstanding interlocutory state court decree concerning the custody of the children.

ARGUMENT

JURISDICTION OF FEDERAL DISTRICT COURT IN THIS HABEAS CORPUS PROCEEDING

The Federal District Court has jurisdiction over this matter under the provision of 25 U.S.C., Section 1303, which reads as follows:

> "The privilege of the Writ of Habeas Corpus shall be available to any person, in a Court of the United States, to test the legality of his detention by order of an Indian Tribe."

The one objection by petitioner is that it is alleged that Mr. Cobell did not exhaust his available Tribal Court remedies before seeking a writ of habeas corpus. The exhaustion of remedies argument is clearly and completely covered by the United States District Judge Battin below, and by the United States Circuit Judge Trask below. In their opinions, found in Exhibits "A," "B," and "C" to the Petition for Writ of Certiorari, starting on pages 31, 45 and 61, respectively, Judge Trask held:

> "We concur with the view expressed by the Eighth Circuit that 'exhaustion is not an inflexible requirement.' *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140. The court there observed:
>
> " 'A balancing process is evident; that is weighing the need to preserve cultural identity of

> the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights. Thus, this Court must determine whether exhaustion is appropriate in the case at bar.' " (page 1146)

The Circuit Court concluded that the District Court was correct when it concluded that Henry Cobell lacked meaningful remedy in the Tribal Courts. The restraining order issued by Judge Sharp of the Tribal Court contained no invitation to participate in tribal appellate processes. Rather, the ex parte order, although designated as "temporary," spoke with a tone of finality. More significantly, however, is the fact that Judge Sharp testified that he had issued the restraining order to test tribal jurisdiction, and that only a Federal Court order would cause him to rescind the action.

LACK OF JURISDICTION OF THE BLACKFEET TRIBAL COURT IN THE MATTER

This question also includes the argument listed as No. 4 by the Petition for a Writ of Certiorari.

First of all, the children were not enrolled members of the Blackfeet Indian Tribe. As pointed out above, they do have Indian blood in them, but of insufficient percentage to allow them to be enrolled as members of the tribe. Therefore, they are actually non-enrolled members of the tribe on the Blackfeet Indian Reservation. The Blackfeet Tribal Court simply did not have jurisdiction over them. The Tribal Council's jurisdiction is one of limitation. Article 6, Section 1(k) of the Constitution and By-laws for the Blackfeet Tribe of the Blackfeet Indian Reservation specifically establishes minor courts for the adjudication of claims or disputes

arising amongst the members of the tribe and for the trial and punishment for members of the tribe charged with the commission of offenses.

This is not a criminal matter. Even though the mother and father, the parties to this litigation, are enrolled members of the tribe, their two children are not. The parties to the litigation have consented to the jurisdiction of the state District Court for the very purpose of terminating the marriage and adjudicating the custody of the children. This case concerns two children, who, by state court order, are to be in the custody of their father, who resides in Montana but not on the Indian Reservation.

The Tribal Law and Order Code clearly demonstrates that the tribe did not consider the area in question essential to tribal self-government. The Tribal Law and Order Code specifically waives Tribal Court jurisdiction, if any it had to waive, in favor of the State of Montana. This is clear reference to and acknowledgment of the fact that the state District Courts of Montana have jurisdiction over the marriage, the divorce and the child custody.

The Law and Order Code, in Chapter 2, Section 1, Jurisdiction, clearly limits jurisdiction to *members* of the tribe. Where you have a mixture of members and non-members, there would have to be specific congressional authorization for the Tribal Courts to have jurisdiction over these children -- none exists.

The Montana Supreme Court in *In the Matter of Cantrell*, 159 Mont. 66, 495 P.2d 179, decided in 1972, in which an Indian mother objected to the jurisdiction of the state court in declaring her child dependent and neglected. The Montana Supreme Court held:

"The District Court ruled that it had jurisdic-

> tion because the child was physically in the county and off the reservation when the petition was filed. That is the sole issue here."

The Indian mother based her appeal on what she called the fact that there is no evidence of acts of neglect attributable to her occurring outside the exterior boundaries of the reservation. Thus, she reasoned, the state courts have no jurisdiction. The mother's only effort to all practical purposes was to remain in the sanctuary of the reservation, oblivious to the needs of her child. This was the unanimous opinion of the Montana Supreme Court.

Judge Trask, in the opinion of the Circuit Court of Appeals, Appendix "A" to the Petition for a Writ of Certiorari, held:

> "This is a unique child custody struggle involving the conflicting jurisdictional claims of the Montana state courts and the Blackfeet Tribal Court. The controversy comes before us on appeal from the granting of a writ of habeas corpus by the federal district court pursuant to 25 U.S.C. Section 1303."

The court further held:

> "We therefore turn to the primary jurisdictional issue involved in this appeal. The State of Montana's interest in the welfare of the Cobell children is beyond dispute. The children were domiciled in the state and enrolled in the state public school system when Joan and Henry Cobell began their divorce proceedings. Presence, domicile and jurisdiction over the parents are well recognized bases for the assertion of jurisdiction to determine

> child custody. Restatement (Second) Conflict of Law, Section 79 (1971). Even more pertinent is Mont. Rev. Stat. Tit. 21, Section 138 (1947) which states:
>
> " 'In an action for divorce the court or judge may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same.'
>
> "Thus, by voluntarily invoking the state court's jurisdiction for divorce purposes, the Cobells clearly submitted the question of their children's custody to the judgment of the Montana state courts."

The court further held that the jurisdiction of the Blackfeet Tribal Court is limited and does not extend to the full range of domestic relations incidents.

JURISDICTION OF MONTANA COURTS

The Constitution of Montana, Article VII, Section 4, and Section 93-318, R.C.M. 1947, give the several District Courts in the state original jurisdiction in all cases at law and in equity, including divorce actions. Before a person can obtain a divorce, he or she must be a resident of the state for one year next preceding the commencement of the action. (Section 21-134, R.C.M. 1947) Further, Section 21-138, R.C.M. 1947, mandates that the court's jurisdiction is continuing as far as child custody matters are concerned until the child becomes an adult. See also, *Barbour v. Barbour*, 134 Mont. 317, 330 P.2d 1093, 1095 (1958). The children are and continue to be wards of the court. See

27B, C.J.S., Divorce, Section 303. Thus, the state District Court has continuing jurisdiction in the matter. Once the court acquires jurisdiction, it cannot be deprived of it, even if the children were removed from its jurisdiction, which, of course, is not the case here. *State v. District Court*, 195 P.2d 549 (Mont. 1920).

Federal courts have consistently held that domestic relations cases are within the jurisdiction of the state courts. For example, in the case of *McCarthy v. Hollis*, 210 F.2d 540 (10 C.A. 1941), involving a divorce action and other incidental matters between an enrolled Indian and his wife, the court, citing many cases, including the United States Supreme Court decisions, said this:

> "It has been consistently said without deviation that the field of domestic relations affecting husband and wife, or parent and child, belongs exclusively to the laws of the states."

At no time do the petitioners argue that the state District Court does not have jurisdiction. In effect, the Tribal Court has attempted to usurp the jurisdiction and the power of the state judicial system of Montana. It has functioned as sort of an appellate court in the matter, but the Tribal Court has not cited any authority upon which to base such premises.

What petitioners are attempting, if successful, would be a dangerous precedent inviting others to ignore and violate court orders, be they state court or federal court orders, whenever a ruling is made against their interests. All they would have to do is run to a reservation and claim they are protected.

In *Paiz v. Hughes*, 417 P.2d 51 (N.M. 1966), where an Indian filed a wrongful death action in state court, the

court said:

> "When Indians do invoke the jurisdiction of state courts, they are bound by the decisions of these courts, and they cannot be heard to complain of the adjudication by these courts of all claims and issues which can be and are properly asserted by or against them in suits which they have initiated." Citing *United States v. Candelaria*, 271 U.S. 432, 46 S.Ct. 561, 70 L.Ed. 1023, *Mars v. McDougal*, 40 F.2d 247 (1930), and other cases.

Most of the arguments of petitioner have been answered in the above discussion, and we will here comment only briefly on the four issues which petitioner has stated. Item 3, concerning the Blackfeet Indian Nation by tribal Ordinance transferring jurisdiction over marriage, divorce and related matters to courts of the State of Montana, assumes that the Indian Nation had jurisdiction over these matters to begin with, but the Blackfeet Tribal Law and Order Code is one of limited jurisdiction, as argued above. In the District Judge's memorandum, opinion, order and judgment, found in Appendix B to the Petition for a Writ of Certiorari, starting on page 45 and continuing to page 51, Judge Battin states:

> "4. Respondents conclude that this court has made an erroneous assumption regarding the extent of Tribal Government authority without specific grant by Congress. The court recognizes that Tribes possess such power as not limited by Congress. But that principle is not that upon which this court predicated its decision. When the court noted that it could find no controlling Federal legislation which would justify the order of the Tribal Court,

this court was not assuming that an Indian Tribe requires a grant of power by Congress to act regarding matters essential to Tribal self-government. It is clear from *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959), that '. . . the Indian Tribes retain exclusive jurisdiction over essential matters of Reservation government in the absence of specific Congressional limitation, . . .' *State of Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 684 (9th Cir. 1969). But we do not here deal with matters within the exclusive jurisdiction of Indian Tribes for we do not deal with matters which are essential to Reservation government. Instead, we are in an area where a Tribe has acted in disregard of the powers of a sovereign state. By doing so, the Tribe erects a barrier between it and the sovereign state. It is the belief of this court that before a Tribe of Indians may so interfere with the powers of the sovereign government of any state, it needs a Congressional grant of authority. Finding no such grant, I find the order of the Tribal Court in this case to be invalid."

SUMMARY AND CONCLUSION

It is the position of your appellee that the jurisdiction is in the state District Court. The marriage of the Cobells was contracted outside of the jurisdiction of the Blackfeet Indian Reservation. The couple, as married people, were residents of the State of Montana and resided in Great Falls, Montana, outside of the Indian Reservation. The parties voluntarily submitted themselves to the state judicial process

for determination of the child custody and divorce issues. The children are not members of the Blackfeet Tribe, nor are they eligible to become enrolled members of the Blackfeet Tribe. Actually, the only relationship the two children have, or the marriage and divorce had, with the Blackfeet Indian Reservation was subsequent to the divorce when the mother took the children, in contravention of state court orders, and lived within the confines of an Indian Reservation.

Further, the Constitution of the Blackfeet Tribe and the Blackfeet Tribal Law and Order Code clearly demonstrate that the Tribal Court lacks jurisdiction over the persons or subject matter. It has no authority whatsoever to set itself up as an appellate court or a court having supervisory power over the Montana judicial process.

For the foregoing reasons, we pray that the Petition for Writ of Certiorari be denied, and that the decision and order of the Circuit Court of Appeals be upheld.

Respectfully submitted this 12th day of May, 1975.

D. PATRICK McKITTRICK
315 Davidson Building
Great Falls, Montana 59405

/s/ D. Patrick McKittrick
Attorney for Appellee

AFFIDAVIT OF SERVICE

State of Montana)
County of Lewis and Clark) ss.

I, D. Patrick McKittrick, attorney for the herein, depose and say, that on the 12th day of May, 1975, I served the foregoing Brief of Appellee upon the parties herein by depositing full, true and correct copies (3 copies to each) thereof in the United States mail, postage prepaid, addressed as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
No. 74-954

UNITED STATES OF AMERICA,
ex rel. HENRY F. COBELL,

Respondent,

-vs-

THE HONORABLE JOHN P.
SHARP and THE BLACKFEET
TRIBAL COURT,

Petitioners.

AMICUS CURIAE BRIEF OF THE STATE OF MONTANA

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IN THE
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October Term, 1975

No. _____

UNITED STATES OF AMERICA,
ex rel. HENRY F. COBELL,

Respondent,

-vs-

THE HONORABLE JOHN P. SHARP
and THE BLACKFEET TRIBAL COURT,

Petitioners

AMICUS CURIAE BRIEF OF THE STATE OF MONTANA

The State of Montana files this amicus brief for the reasons that the legal issues presented directly affect the Department of Social and Rehabilitation Services, State of Montana, and in particular, its Division of Child Welfare Services which handles custody of children, adoptions, youth in need of care, guardianships and an absent parent child support program. Which courts have jurisdiction and which courts do not in said matters will directly affect all of the above programs and involve the custody and best interests of many, many children in the State of Montana and elsewhere.

The department is faced with many cases where a parent and, in particular, Indian parents, obtain divorces in state district courts and later apply for aid to dependent children benefits through the State Department of Social and Rehabilitation Services. Some attempt to evade this responsibility by returning to the Indian Reservation

and claiming that the Indian courts will not enforce state court custody orders and the related question of jurisdiction.

This brief is filed pursuant to Rule 42, Rules of the Supreme Court, 28 U.S.C., Appendix, page 7694.

POSITION OF AMICUS

The State of Montana, as Amicus Curiae, takes the position that the respondent, Henry F. Cobell, should prevail and the Petition for a Writ of Certiorari to the United States Supreme Court should be denied.

STATEMENT OF THE CASE

Joan R. Cobell and Henry F. Cobell were married on October 17, 1963, at Cardston, Alberta, Canada. They are Indians and are both enrolled members of the Blackfeet Tribe. Two children were born of that marriage, to-wit, Rodney Dale Cobell and Venetta Lynn Cobell. The two children contain some Indian blood, but insufficient blood to be considered as enrolled members of the tribe. In fact, they are not enrolled members of the Blackfeet Tribe and, because of the percentage of Indian blood, they cannot become enrolled members of the Blackfeet Tribe.

In August, 1971, while the couple were residents of Great Falls, Montana, Joan R. Cobell filed for divorce in the state District Court of the Eighth Judicial District, in and for the County of Cascade, Montana. The couple had been residents of Montana for more than a year preceding the commencement of the divorce action. In her complaint, besides asking for a divorce, Joan R. Cobell asked that the court grant her the care, custody and control of the two minor children, and she asked for child support payments.

On October 21, 1971, Henry F. Cobell answered the

allegations to the complaint on file in the state district court and counterclaimed, requesting that the court grant him a divorce, and he asked for the care, custody and control of the two minor children.

The issues were joined and a hearing was held on the merits. On December 22, 1971, with both sides consenting to the jurisdiction of the court, the district court granted to both Joan R. Cobell and Henry F. Cobell a divorce, each from the other. The court also declared that the defendant, Henry F. Cobell, was a fit and proper person to have the care, custody and control of the two minor children and it granted him the temporary custody of the children. The court further ordered that the Court of Conciliation of the Eighth Judicial District of the State of Montana should make an immediate study of the needs of the children and the type of home each of the parties were able to provide for the said children, and asked the Court of Conciliation to secure the assistance of the Mental Hygiene Clinic in this regard.

Subsequent to that order, the plaintiff, Joan R. Cobell, petitioned the court for an order changing the custody of the two minor children to plaintiff, Joan R. Cobell. On August 14, 1972, without a hearing, the court ordered the minor children to be in the temporary custody of Joan R. Cobell. A show cause hearing was set for the 14th day of September, 1972, regarding the change of the said custody from Henry F. Cobell to Joan R. Cobell. However, the state District Court, without affording the defendants due process or any substantive hearing, granted the temporary custody of the two minor children to the plaintiff, Joan R. Cobell.

On September 19, 1972, Mr. Cobell petitioned the Montana Supreme Court for a Writ of Prohibition, asking

relief from that court and for an order rescinding the District Court's order granting to Joan R. Cobell the temporary custody of the two minor children. On September 19, 1972, the Montana Supreme Court issued a show cause order to the state District Court to appear on September 28, 1972, and to show cause why Mr. Cobell should not receive the relief he prayed for. Subsequent to the show cause order being issued, the state District Court deleted from its order of September 14, 1972, that portion relating to changing the custody to Joan R. Cobell. Accordingly, the temporary custody of the two children remained with Henry F. Cobell.

In the meantime, Joan R. Cobell took the two children to Browning, Montana, which is located on the Indian Reservation. When the order of the Montana Supreme Court came down, Mrs. Cobell took the two children out of the public school system in Browning, Montana, and disappeared for approximately three weeks.

By order of the state District Court dated September 26, 1972, the said District Court reinforced its order that the custody of the two minor children should be with their father, Henry F. Cobell, and that Joan R. Cobell should immediately return the two children to their father. The court also issued orders to the sheriff and his deputies to insure that the provisions of the order were complied with. Joan R. Cobell refused to comply with the order and continued to refuse to obey the order of the Montana Supreme Court and the state District Court. On October 11, 1972, the state District Court issued a warrant of attachment for the arrest of Joan R. Cobell, setting bail in the sum of one thousand and no/100 dollars ($1,000.00).

On or about October 6, 1972, through an order drafted by an attorney at law and signed by Judge John Sharp,

the Blackfeet Tribal Court asserted temporary care, custody and control over the two minor children and ordered them not to be removed from the Blackfeet Indian Reservation. This is a case of first impression on the Blackfeet Indian Reservation.

It is undisputed that both of the parents voluntarily submitted themselves to the jurisdiction of the state District Court of the Eighth Judicial District of Montana in order to have their marriage dissolved and to have the issue of the care, custody and control of the two minor children determined.

Joan R. Cobell was served with the petition for writ of habeas corpus and order to show cause in this matter on October 18, 1972. She failed to honor said documents and did not appear at said hearing held on October 25, 1972.

ARGUMENT SUMMARY

The three major issues at hand are:

1. Jurisdiction of the Federal District Court in this habeas corpus proceeding.

2. The lack of jurisdiction of the Blackfeet Tribal Court in the matter.

3. The jurisdiction of the Montana courts.

Other issues raised by petitioners herein are:

1. Whether this is a proper case for ruling that a person aggrieved by an order of the Indian Tribal Court must exhaust available Tribal Court remedies before seeking a writ of habeas corpus from the United State District Court.

2. Whether Indian Tribal Courts must give full faith

and credit to state court judgments where the state courts do not recognize judgments rendered by Indian Tribal Courts, but where the litigants, as enrolled Indians, consent to the jurisdiction of the state court.

3. Whether the Blackfeet Indian Nation properly transferred jurisdiction over marriage and divorce and related matters to the courts of the state of Montana.

4. Whether the Tribal Court could assume jurisdiction over non-enrolled Indian children found on the Blackfeet Indian Reservation.

JURISDICTION OF FEDERAL DISTRICT COURT IN THIS HABEAS CORPUS PROCEEDING

The Federal District Court has jurisdiction over this matter under the provisions of 25 U.S.C., Section 1303. It states:

> "The privilege of the Writ of Habeas Corpus shall be available to any person, in a Court of the United States, to test the legality of his detention by order of an Indian Tribe."

The United States District Judge in his opinion faced the question of whether one person could invoke the writ in regard to other persons, to-wit, the father invoking the writ in regard to his children. He stated:

> "Here, there is an additional question: That is, the right of this petitioner to contest the custody of one other than himself.
>
> "That there is non-identity of the petitioner with the person subject to the allegedly

> unlawful custody presents no obstacle to decision. The father of minor children, where he is the custodial parent, necessarily has standing to question the detention of his children."

LACK OF JURISDICTION OF THE BLACKFEET TRIBAL COURT IN THE MATTER

The Tribal Council's jurisdiction is one of limitation. Article 6, Section 1(k) of the Constitution and By-laws for the Blackfeet Tribe of the Blackfeet Indian Reservation reads as follows:

> "To promulgate ordinances for the purposes of safeguarding the peace and safety of residents of the Blackfeet Indian Reservation, and to establish minor Courts for the adjudication of claims or disputes arising amongst the members of the tribe, and for the trial and punishment for members of the tribe charged with the commission of offenses set forth in such ordinances."

It is obvious that the jurisdiction of the Tribal Council does not extend to matters involving non-members of the Blackfeet Tribe. The children, in the case at hand, are non-enrolled members of the Blackfeet Tribe. This is exhaustively briefed by Appellee before the Ninth Circuit Court of Appeals, on pages 6, 7, 8 and 9.

Here the parties to the litigation definitely submitted to the jurisdiction of the state court. The state court acted and issued its order on custody. The Tribal Court then stepped in and said, we're going to take over and issue a temporary order on custody until you come up with an

order that we would consent to. The Tribal Court, in effect, is acting as an appellate court over the state District Court. This is not the function of an Indian Tribal Court. To allow it to do so will cause havoc, uncertainty and injustice in many child custody cases. It would cause a multiplicity of suits, a crowding of court calendars and an unwarranted restraint over the state District Courts by the Tribal Courts. The United States Supreme Court should definitely delineate that party litigants in such situations cannot run to a Tribal Court and attempt to have the custody decision of a state District Court overturned.

JURISDICTION OF MONTANA COURTS

The Constitution of the State of Montana, Article VII, Section 4, gives the District Courts in the state original jurisdiction in all cases at law and in equity, which includes divorce actions. Before a person can obtain a divorce, he or she must be a resident of the state for one year next preceding the commencement of the action. (Section 21-134, R.C.M. 1947, as amended.) In addition, Section 21-138, R.C.M. 1947, mandates that the court's jurisdiction is continuing as far as child custody matters are concerned, until such child reaches the age of an adult. In fact, the Montana Supreme Court has held that it is improper to terminate custody at a hearing on contempt for non-support when respondent had not been given notice that custody would be at issue. See *State ex rel. Shelhamer v. District Court*, 159 Mont. 11, 494 P.2d 928. There is an obvious lack of due process where one of the parties is not given notice or even is present to defend himself when a change of custody matter is considered.

It is important to note that the appellants have never questioned the jurisdiction of the state District Court in the

matter at hand.

It is difficult to improve upon the reasoning of Circuit Judge Trask in his opinions reported in Appendix A of the Petition for Writ of Certiorari, starting on page 37. Judge Trask stated:

> "Thus, by *voluntarily* invoking the state court's jurisdiction for divorce purposes, the Cobells clearly submitted the question of their children's custody to the judgment of the Montana state courts. Moreover, Montana, like the majority of states, views its jurisdiction in custody matters as continuing, *Barbour v. Barbour*, 134 Mont. 317, 330 P.2d 1093 (1958), and unaffected by the removal of the children from the state, *Butts v. Collins*, 129 Mont. 61, 289 P.2d 949 (1955)."

EXHAUSTION OF REMEDIES THROUGH THE TRIBAL COURT

It is difficult to follow the argument of petitioner that Mr. Cobell had not exhausted his remedies before the Indian Tribal Court. Judge Battin, the U.S. District Judge, noted in his memorandum, opinion, order and judgment, found in Appendix B of Petition for a Writ of Certiorari, starting on page 47:

> "As noted in the previous order, Judge Sharp testified before this court that it was his intention not to rescind his order, that he had issued it for purposes of testing his jurisdiction, and that he did not expect it changed except by order of a Federal Court. From his testimony, it is the opinion of this court

> that the petitioner had no effective remedies available to him in Tribal Court. Whatever remedies may have existed were effectively curtailed by the entrance of the order which the court has heretofore held invalid. That remedies are available in theory, but not in fact, is not synonymous with failure to exhaust remedies. That ineffective and meaningless procedures were available to petitioner does not preclude his seeking a writ of habeas corpus."

The law does not demand the doing of a useless act.

Circuit Judge Trask, in his opinion, starting on page 34 of Appendix A to the Petition for a Writ of Certiorari, comments on the exhaustion of tribal remedies as follows:

> "Unlike the general habeas corpus statute directed against unlawful state custody (28 U.S.C., Section 2254), there is no express exhaustion requirement contained in the specialized writ which is involved in this contorversy, 25 U.S.C., Section 1303. . . . Likewise, we do not believe that the District Court here erred when it concluded that Henry Cobell lacked meaningful remedy in the tribal courts. First, the restraining order issued by Judge Sharp contained no invitation to participate in tribal appellate processes. Rather, the *ex parte* order, although designated as 'temporary', spoke with a tone of finality. . . ."

THE ISSUE OF FULL FAITH AND CREDIT BETWEEN TRIBAL COURTS AND STATE COURTS

Petitioner confuses the issue by trying to argue the

question of full faith and credit between Tribal Courts and state District Courts. As stated above, the Tribal Court in this case is attempting to act like an appellate court over the state District Court. It has issued an ex parte order denying due process to Henry Cobell, reversing the order of the state District Court and stating that its order will remain until the state District Court changes its ruling to support the feelings of the Tribal Court. The Tribal Court in this case simply did not have jurisdiction. The enrolled tribal members, the plaintiff and defendant, the parents of the children, voluntarily consented to the jurisdiction of the state District Court. That court has acted, and now one of the parties runs to the Tribal Court and, without a hearing on the merits, attempts to have the order reversed, claiming that it has jurisdiction over the Indians on the reservation, but the two children are not enrolled members of the tribe and cannot be because of their lack of the required percentage of Indian blood.

DID THE BLACKFEET INDIAN NATION PROPERLY TRANSFER JURISDICTION OVER MARRIAGES AND DIVORCES AND RELATED MATTERS TO THE COURTS OF THE STATE OF MONTANA?

This should be answered in the affirmative. The power of the Indian Tribal Courts is clearly spelled out, and this court should so hold. The Blackfeet Tribal Court is a court of "limited jurisdiction." Chapter 1, Section 1, clearly refers to criminal offenses which are enumerated in Chapter 5 of said code. Chapter 2, Section 1, clearly limits jurisdiction to members of the tribe. The children in this particular action are non-enrolled members of the tribe. Nowhere in the code or in any federal law or in the United States Constitution are the Tribal Courts given jurisdiction over marriage and divorce and related matters.

THE TRIBAL COURT COULD NOT ASSUME JURISDICTION OVER THE CHILDREN IN THE CASE AT HAND AND ISSUE AN ORDER INCONSISTENT WITH AN OUTSTANDING STATE COURT DECREE CONCERNING THE CUSTODY OF THE CHILDREN

Petitioner erroneously states that the fourth issue is whether the Blackfeet Tribal Court could assume jurisdiction over Blackfeet Indian children found on the Blackfeet Indian Reservation. The facts of the case are that the children are not enrolled Blackfeet Indian children and they cannot become enrolled Blackfeet Indian children. They lived off the reservation and were in the public school system and were brought to the Indian reservation by their mother, contrary to the order of the state court. The Blackfeet Tribal Court does not have jurisdiction over these children, and this court should so hold.

SUMMARY AND CONCLUSION

The State of Montana, Amicus Curiae, supports the position of the father, Henry F. Cobell. Unless clearly defined guidelines are set forth in the jurisdiction of custody of children in divorce and marriage and related matters, irreparable damage will be done to many children. There will be a constant flood of litigation of one court overruling another court, of no one knowing for sure which order to obey, children will be snatched from one jurisdiction and one state court to Tribal Courts, to reservations. The State of Montana basically attempts to protect the interests of the children. Most of the arguments which have gone before in this case have centered around the rights and best interests of the father and of the mother, and even of the grandmother; but we would argue that this court should look to the best interests of the children, and that would dictate well-

defined limits of jurisdiction and guidelines for both the Tribal Courts, the state courts, and the United States court to follow in child custody matters.

For these reasons, we respectfully ask that this court uphold appelle's position and deny the Petition for Writ of Certiorari.

Respectfully submitted this 12th day of May, 1975.

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AFFIDAVIT OF SERVICE

State of Montana)
County of Lewis and Clark) ss.

I, Thomas H. Mahan, one of the attorneys for the State of Montana, Amicus Curiae, herein, depose and say, that on the 12th day of May, 1975, I served the foregoing Amicus Curiae Brief of the State of Montana upon the parties herein by depositing full, true and correct copies (3 copies to each) thereof in the United States mail, postage prepaid, addressed as follows:

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